Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

FERNANDO E. MATA,
Petitioner,

v.

FEDERAL BUREAU OF INVESTIGATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

DANIEL F. KATZ
STEPHEN D. RABER *
WILLIAMS & CONNOLLY
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000
Attorneys for Petitioner

* Counsel of Record

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QUESTIONS PRESENTED

1. When a federal employee successfully sues under Title VII and then proffers overwhelming evidence of retaliation against him for having done so, is a district court deprived of all jurisdiction to remedy that retaliation if the government terminates him and invokes "national security" as its defense?

2. Does Title VII oust the district courts of jurisdiction over *Bivens* actions as to claims that are excluded from the scope of Title VII?

LIST OF PARTIES

The parties to the proceeding in the Court of Appeals were Fernando E. Mata as appellant, and the Federal Bureau of Investigation; Edwin Meese, Attorney General; and William S. Sessions, Director, Federal Bureau of Investigation, as appellees.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in this case on December 13, 1995.

OPINIONS BELOW

The opinion of the District Court is unreported and is reproduced in the Appendix at A. 5a.[1] The opinion of the Court of Appeals is reported at 71 F.3d 513 and appears at A. 1a.

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[1] References to "A." are to the appendix to this petition. References to "R." are to the record in the Court of Appeals.

JURISDICTION

The judgment of the District Court was entered February 8, 1995. A. 5a. The opinion and judgment of the Court of Appeals were entered December 13, 1995. A. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and Fifth Amendments to the Constitution of the United States, 42 U.S.C. § 2000e-2, 42 U.S.C. § 2000e-3, and 42 U.S.C. § 2000e-16 are reproduced in full or in pertinent part at Appendix C, A. 13a.

STATEMENT

The FBI fired Petitioner eleven months before he could have retired with full benefits as a twenty-year special agent. Petitioner alleged that he was fired because he is an Hispanic agent who successfully participated in a class action lawsuit against the FBI for violations of Title VII. *See Perez* v. *FBI*, 707 F. Supp. 891 (W.D. Tex. 1988).

A. Petitioner's Participation in the Class Action

On January 14, 1987, Bernardo M. Perez filed a class action Complaint against the FBI in the United States District Court for the Western District of Texas. R. 1. The Complaint sought relief under Title VII because of the FBI's "discriminatory employment practices based on race, national origin and religion." *Id.* Perez filed a Second Amended Complaint on June 23, 1987, adding a "cause of action to redress deprivations of civil rights pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)." R. 57. On July 16, 1987, the District Court granted Perez's motion for class certification. R. 65-66. The class con-

sisted of "all hispanic (sic) special agents of the Federal Bureau of Investigation that are currently employed by the Bureau, and any hispanic (sic) special agents that might become employed by the Bureau during the pendency of this lawsuit." *Id.*

Petitioner joined the class, gave a deposition, and testified at trial. R. 67. The District Court found that the FBI had violated Title VII by discriminating against the class members because they were Hispanic. 707 F. Supp. at 929. The District Court then established a Rightful Place Seniority Panel ("Panel") to determine the appropriate remedy for each individual class member. *See Perez* v. *FBI*, 714 F. Supp. 1414, 1417 (W.D. Tex. 1989).

B. The Motion for Relief from Retaliation

Before Petitioner could appear in front of the Panel to obtain his remedy, the FBI filed a motion to stay his appearance pending the resolution of its internal investigation of Petitioner. R. 102; docket sheet, entry no. 522. The District Court granted the FBI's motion. The FBI then resolved its investigation by revoking Petitioner's security clearance and firing him. R. 252-53.

Petitioner filed a motion in the District Court requesting (i) an evidentiary hearing on his allegations of retaliation, (ii) permission to appear before the Panel, and (iii) damages and equitable relief. R. 67. The FBI argued that the District Court lacked jurisdiction to review Petitioner's claims, relying on *Department of Navy* v. *Egan*, 484 U.S. 518 (1988). R. 273. The FBI took the position that *Egan* precludes federal-court jurisdiction to review an Executive Branch decision to revoke a security clearance, even when the revocation is pretextual and done solely in retaliation for bringing a Title VII claim. R. 273.

C. Petitioner's Proffered Evidence of Retaliation [2]

Petitioner proffered overwhelming evidence that the FBI "got even" with him. For fifteen years, he had a spotless record at the FBI. In 1983 he won the Attorney General's Distinguished Service Award for his "extraordinary services . . . in an area vital to the national security, frequently in an atmosphere of substantial personal hazard." R. 91-97. He had never been the subject of a single reprimand, censure or adverse action. R. 76. But things changed after he joined the *Perez* class action.

The first retaliation occurred after Petitioner spoke publicly about the lawsuit at a fundraiser for the class action. The day after Petitioner's comments appeared in the newspaper, Petitioner's supervisor, William E. Wells, berated him in front of approximately 150 agents, stating that Petitioner had done irreparable damage to the image of the Miami Division and been disloyal to the FBI. R. 100-01. Mr. Wells then summoned the Hispanic agents to his Executive Conference Room. He scolded Petitioner in front of the others and singled him out for disloyalty. He then held up his FBI credentials and told the Hispanic agents that when they carried those credentials, they lost their First Amendment rights. R. 100-01.

The next retaliation surrounded Petitioner's testimony. After his deposition was scheduled, Petitioner was told that he would be promoted to Supervisor depending on his cooperation with the Bureau. R. 101. However, several days later, Petitioner was told that he was under investigation for matters relating to national security. R. 101.

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[2] Both parties submitted affidavits and other documents in connection with Petitioner's motion. However, the District Court made no factual findings and treated the FBI's opposition as a motion to dismiss. Accordingly, Petitioner's allegations must be taken as true. *See, e.g., Radovich* v. *National Football League*, 352 U.S. 445, 448 (1957).

In the weeks preceding Petitioner's deposition, two agents confronted him and forced him to sign a written statement. R. 101. Petitioner was also informed that he would have to submit to a polygraph exam. R. 102. And during the deposition, the FBI took from the briefcase of Petitioner's attorney a privileged memorandum that Petitioner had written. R. 78, 106-08. At a hearing requesting sanctions against the FBI regarding this matter, the District Court described the FBI's conduct as "a Fourth Amendment violation," but issued only a warning. R. 108. Petitioner testified at trial on August 15, 1988. R. 102. When he returned to work, his supervisor told him that the FBI wanted to polygraph him immediately. R. 102.

Meanwhile, at the same time Petitioner was giving his deposition and trial testimony, the FBI was interviewing three of his co-workers and two of his supervisors as part of its "national security" investigation. After conducting the interviews and investigating allegations concerning Petitioner, the FBI concluded in an internal memorandum that "all logical investigation has been completed in an attempt to verify these allegations [against Petitioner], *without result.*" R. 273, FBI memo dated 10/18/88, attached to Dixon Declaration, at Tab W (emphasis added).[3]

Declarations from two of the FBI investigators also concluded that Petitioner had done nothing wrong:

- "In this case, there were no facts or allegations to the effect that SA Mata had violated any statute or any internal policies or procedures of the FBI

[3] The FBI filed some of its pleadings in the District Court under seal, including the 1988 declarations referred to in this Petition. The portions of those declarations cited herein are not under seal. Counsel for the FBI has custody of the complete documents and has stated that copies will be made available to the Court upon request.

. . . ." R. 273, Declaration of Charles W. Dixon, November 23, 1988 ("Dixon Decl.") ¶ 10.

- "The agents interviewed could not provide any information to support the issue . . . reporting that FERNANDO MATA may have misused case funds." R. 273, FBI memo dated 6/13/88, attached to Dixon Decl. at Tab K.

- "In the present case, I did not possess facts that gave rise to a belief that SA Mata had violated any Federal law . . . ." R. 273, Declaration of William Q. Doherty, November 23, 1988 ("1988 Doherty Decl.") ¶ 7.

- "I had no facts that would have served as a basis for the belief that SA Mata had violated any internal rules, regulations or policy of the FBI or DOJ which would give rise to an administrative inquiry. The OPR and SPU viewed this matter in the same light, which is apparent from their declination to go further administratively." R. 273. 1988 Doherty Decl. ¶ 8.

For its part, the Department of Justice declined to prosecute Petitioner based on information provided by the FBI, concluding that it could not find "any prosecutable violation of federal criminal law." R. 110.

Rather than dropping its investigation after concluding that Petitioner had done nothing wrong, the FBI increased the pressure. Among other things, the FBI forced Petitioner to take three polygraph exams, interrogated him more than ten times, and confiscated personal items from his desk and locked cabinet, including attorney-client communications. R. 101-03, 901-02.

Petitioner received formal notification on January 24, 1990 that his access to National Security Information was suspended "due to information provided . . . indicating you have disclosed classified information to unauthorized individuals." R. 151. On April 9, 1991, the FBI revoked Petitioner's security clearance. R. 188-97. And on Sep-

tember 6, 1991, the FBI fired him. R. 252-53. On that date, Petitioner was less than one year away from retirement with full benefits as a twenty-year agent. His premature termination deprived him of a substantial portion of those benefits.

The FBI informed Petitioner that its decision was based on Petitioner's "admitted" unauthorized disclosure of classified information to individuals representing the Cuban Government and his fabrication and embellishment of official reports. R. 167. Petitioner denied these charges. R. 174-77, 203. Despite Petitioner's requests, the FBI refused to provide him any of the materials that formed the basis of its action.

Petitioner had no opportunity to examine documents, call witnesses, cross-examine witnesses, or participate in an evidentiary hearing. His fate was left entirely in the hands of those whom the District Court found had discriminated against him, and who the court had found abused the grand jury process to retaliate against Bernardo Perez, the class representative. *Perez*, 707 F. Supp. at 930-35.

D. The District Court Proceedings

Petitioner sought discovery from the FBI but the District Court stayed discovery pending a ruling on the FBI's request to dismiss Petitioner's claims for lack of subject matter jurisdiction. The District Court heard oral argument by counsel on Petitioner's motion, and issued its opinion on February 8, 1995. *See* A. 5a. The District Court made no findings regarding the proffered evidence of retaliation, but adopted the FBI's legal position and dismissed Petitioner's claims for lack of subject matter jurisdiction. A. 12a.

Relying on *Egan* and the "legislative history" of Title VII, the District Court held that Congress had not intended to provide "judicial review of Executive security clearance decisions" when it extended Title VII protection

to federal employees. A. 11a. Petitioner also argued that he was entitled to judicial review of his First and Fifth Amendment claims under *Webster* v. *Doe*, 486 U.S. 592 (1988), which permits district courts to review "constitutional claims," even when "national security" is invoked as the reason for the Executive decision to revoke a security clearance. *Id.* at 603. The District Court held that Petitioner could not raise any "constitutional claims" because Title VII provided his exclusive judicial remedy. A. 9a (citing *Brown* v. *GSA*, 425 U.S. 820 (1976)).

E. The Court of Appeals Decision

On appeal Petitioner challenged the District Court's interpretation of Title VII and its conclusion that the enactment of Title VII barred judicial review even of constitutional claims that cannot be remedied by Title VII. The Fifth Circuit disposed of Petitioner's appeal in a *per curiam* opinion. The Court of Appeals held that although in "the ordinary Title VII situation" Petitioner would be entitled to show that the FBI's reasons for its actions were a "pretext," A. 2a, the court had no jurisdiction in this case because it would require "some judicial scrutiny of the merits of the revocation decision." A. 3a. The Court of Appeals also held that there was no jurisdiction over Petitioner's *Bivens* claims because "Title VII provides both the exclusive cause of action and the exclusive remedy for federal employees who wish to assert claims of employment discrimination." A. 4a (citing *Brown*, 425 U.S. 820).

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision permits a federal agency to fire an employee for successfully bringing a Title VII claim. As long as the agency revokes the employee's security clearance and cites "national security" as its reason, the courts have no jurisdiction to review the matter. However, in *Webster*, this Court held that a homosexual employee of the CIA was entitled to judicial review of

his "constitutional claim" that the CIA fired him in violation of his right to equal protection of the laws. 486 U.S. at 602-03. In light of *Webster*, the Fifth Circuit's decision creates the anomaly that if a person loses his security clearance and is fired because he is homosexual, he is entitled to judicial review of that decision. But if the same thing happens to him because he successfully sues his employer for race discrimination, he is out of luck.

The FBI's position is that it can fire anyone based on race, religion, national origin, gender, or participation in a civil rights lawsuit, and there is nothing that this Court —or any other federal court—can do about it. Federal jurisdiction is completely ousted, according to the FBI, whenever the FBI revokes an employee's security clearance and utters the magic words—"national security."

The Court of Appeals adopted that position, and effectively immunized the FBI and other federal agencies from liability for conduct that violates the core of Title VII and the Constitution. In any case where the plaintiff alleges retaliation or discrimination based on race, religion, national origin, or gender, the FBI can simply revoke his security clearance and obtain a dismissal on the grounds that the court has no jurisdiction. The FBI and other agencies now have in their arsenal a bulletproof defense to these claims.

The decision below cannot be reconciled with the commands of Title VII or the decisions of this Court. In Title VII cases, if the defendant articulates a legitimate, non-discriminatory reason for its adverse action, the plaintiff "must . . . be afforded a fair opportunity to show that [the] stated reason for [the action] was in fact pretext." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804 (1973); *see also Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1980). The Fifth Circuit's decision eliminates this indispensable element of Title VII protection. The decision also disregards the EEOC's posi-

tion that "[e]mployers cannot, merely by invoking national security, exempt themselves from coverage of the nondiscrimination provisions of [Title VII]." *EEOC: Policy Statement on National Security Defense to Bias Charges*, ("EEOC Policy Statement") 8 Lab. Rel. Rep. (BNA) 405:6625 (Approved by Chairman Thomas, May 1, 1989).

In addition, the decision cannot be squared with this Court's decisions regarding the ouster of jurisdiction over constitutional claims. Since at least 1803, the Judiciary has been charged with ultimate responsibility for determining what the Constitution requires. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). More recently, in *Webster*, this Court "emphasized . . . that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." 486 U.S. at 603 (citing *Johnson* v. *Robison*, 415 U.S. 361, 373-74 (1974) and *Weinberger* v. *Salfi*, 422 U.S. 749 (1975)). Thus, Title VII does not pre-empt the assertion of constitutional claims when the plaintiff is "unprotected by the statute." *Davis* v. *Passman*, 442 U.S. 228, 247 (1979). Here, the Court of Appeals relied on Title VII to oust jurisdiction over Petitioner's constitutional claims, even though it held that Petitioner's claims are excluded from the scope of Title VII.

The Court of Appeals' holding—that there is no jurisdiction even to consider whether the FBI retaliated—is the legal equivalent of "heads I win, tails you lose." The government cannot have it both ways. Either Petitioner is entitled to judicial review under Title VII—as this Court, the statute, and the EEOC say—or he is entitled to judicial review of his constitutional claims on the grounds that Title VII does not cover those claims.

I. THE FIFTH CIRCUIT'S DECISION IS IN CONFLICT WITH THIS COURT'S DECISIONS REGARDING TITLE VII.

In a unanimous opinion, this Court in *McDonnell Douglas* established the basic requirements for proving a Title VII case. First, the plaintiff must establish a prima facie case of discrimination. 411 U.S. at 802. Second, if the plaintiff makes a prima facie case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse action. *Id.* Third, if the defendant carries this burden, the plaintiff must then have an opportunity to prove that the legitimate reasons offered by the defendant were not its true reasons, but rather a pretext for discrimination. *Id.* at 804. This Court unanimously reaffirmed these requirements in *Burdine*, 450 U.S. at 252-53.

The third stage of *McDonnell Douglas* is crucial because if the plaintiff fails to show "pretext," the challenged employment action "must stand." 411 U.S. at 807. Eliminating the third stage effectively eliminates Title VII cases because the defendant's burden in the second stage—to articulate a legitimate, non-discriminatory reason—is not heavy. "The defendant need not persuade the court that it was actually motivated by the proffered reasons." *Burdine*, 450 U.S. at 254. Rather, the defendant need only satisfy a "burden of production," *id.* at 255 n.8, which "is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Id.* at 254-55. For that reason, this Court has repeatedly held that the "plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext." *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 578 (1978); *see also United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716 n.5 (1983).

The Court of Appeals' decision eliminates the third stage of *McDonnell Douglas* in a Title VII retaliation

action. The defendant not only wins, but ousts all jurisdiction, merely by raising "a genuine issue of fact." *Burdine*, 450 U.S. at 254. The decision unravels *McDonnell Douglas* and defeats the basic purpose of Title VII's retaliation provision, which is to "protect the employee who utilizes the tools provided by Congress to protect his rights." *Sias* v. *City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978). The decision also disregards both the plain, unambiguous language of Title VII and the EEOC's interpretation of it.

Title VII applies to "[a]ll personnel actions." 42 U.S.C. § 2000e-16(a). Title VII also makes it "unlawful . . . for an employer . . . to discriminate against any individual . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). When "national security" is at stake, however, section 703(g) of Title VII allows an employer to discharge an individual if his position

> is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and . . . such individual . . . has ceased to fulfill that requirement.

42 U.S.C. § 2000e-2(g).

The question is whether section 703(g) precludes *judicial review* of Title VII claims whenever the government cites "national security" as its reason for discharging an employee. The Court of Appeals answered "yes." The answer, according to the EEOC, is "no."

After *Egan*, the EEOC published a Policy Statement "concerning the use of the national security exception in section 703(g) of Title VII as a defense against a charge of employment discrimination." EEOC Policy Statement, 8 Lab. Rel. Rep. at 405:6625. The EEOC concluded that section 703(g) is merely "an affirmative defense to

a charge of discrimination," not a bar to jurisdiction. *Id.* at 405:6625. Thus, "[e]mployers cannot, *merely by invoking national security*, exempt themselves from coverage of the nondiscrimination provisions of the act." *Id.* at 405:6626. Since announcing this policy statement, the EEOC has routinely adhered to it in cases litigated before the agency. *See, e.g., Schroeder* v. *Perry*, 1994 WL 735565 at *3 (E.E.O.C. April 14, 1994); *Phillips* v. *Dalton*, 1995 WL 95860 at *3 (E.E.O.C. March 3, 1995); *Fields* v. *Aspin*, 1993 WL 763357 at *3 (E.E.O.C. December 23, 1993).

In accordance with the *Chevron*[4] doctrine, this Court holds that "the EEOC's interpretation of Title VII . . . need only be reasonable to be entitled to deference." *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988). The EEOC's construction of the scope of the "national security" defense is "reasonable" given Congress' intent in Title VII to "eradicat[e] completely" from federal employment "discrimination of *any* kind based on factors not relevant to job performance." *See* H.R. Rep. No. 238, 92d Cong., 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. 2137, 2158 (emphasis added) (quoting Memorandum of President Nixon accompanying Exec. Order No. 11,478).

Title VII states in unmistakable language: "*All personnel actions* affecting employees . . . in executive agencies . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a) (emphasis added). Congress' explicit command that Title VII covers *all* personnel actions should be interpreted to mean just that. *See South Dakota* v. *Bourland*, 113 S. Ct. 2309, 2315-16 (1993) ("when Congress used the term 'all claims, rights, and demands' of the Tribe . . . it meant *all* claims, rights, and demands") (emphasis in original) (citation omitted). Al-

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[4] *Chevron, U.S.A.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

though section 703(g) may provide a "national security" *defense* to a Title VII claim, it does not deprive the courts of *jurisdiction*. The word "jurisdiction" does not even appear in section 703(g). Nothing in Title VII states that the courts are ousted of jurisdiction to determine whether "national security" is a pretext for retaliation.

As the EEOC concluded, this Court's decision in *Egan* does not deprive a district court of that jurisdiction. EEOC Policy Statement, 8 Lab. Rel. Rep. at 405:6626. In *Egan*, this Court addressed the "narrow question . . . whether the Merit Systems Protection Board (Board) has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action." 484 U.S. at 520. The Court held that the Board could not review the security clearance decision because the statute at issue—the Civil Service Reform Act of 1978—gave the Board jurisdiction only over "adverse actions," which by definition did not include the denial of a security clearance. *Id.* at 530.[5]

Egan "did not speak to the situation in which there is an allegation of the government's *pretextual* revocation of a security clearance." *Buttino* v. *FBI*, 801 F. Supp. 298, 301 (N.D. Cal. 1992) (emphasis in original). The *Egan* plaintiff did not allege a Title VII retaliation claim or a

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[5] The statute defined "adverse actions" specifically to include only "a removal, a suspension for more than 14 days, a reduction in grade or pay, and a furlough of 30 days or less." *Id.* (citing 5 U.S.C. §§ 7513(d), 7512). The denial of a security clearance was not included on the specific list of actions over which the Board was given authority. By contrast, in Title VII Congress did not enact a laundry list of actions to which Title VII applies. Congress chose instead to use the broadest grant of authority possible. Thus, Title VII applies to "[a]ll personnel actions," 42 U.S.C. § 2000e-16(a), which by definition must include the revocation of a security clearance. *Cf. Hubbard* v. *United States*, 115 S. Ct. 1754, 1759 (1995) (courts are bound to apply the plain, unambiguous language of statutes).

Bivens action. He claimed only that the Navy improperly denied him a security clearance based on his failure to disclose prior convictions and admitted alcohol abuse. 484 U.S. at 521. His Title VII and constitutional rights were not even implicated because his status as an alcoholic felon is not a protected class under Title VII or the Constitution.

Although *Egan* does require that deference be given to the Executive Branch on matters of national security, *id.* at 530, "deference to Executive Branch decisions does not require the Judiciary to abdicate its authority under Article III to decide whether or not an individual's right to equal protection under the Federal Constitution has been violated." *Buttino*, 801 F. Supp. at 301 (quoting *Dubbs* v. *CIA*, 769 F. Supp. 1113, 1116 n.3 (N.D. Cal. 1990)). In direct conflict with *McDonnell Douglas*, the language of Title VII, and the EEOC's construction of Title VII's "national security" defense, the Fifth Circuit's decision allows FBI officials to "discriminat[e] *through* their security clearance decision-making authority with the comfort of knowing that the nonreviewability of the 'merits' of security clearance determinations would serve to immunize the *discrimination* from judicial review." *Id.* (emphases in original).[6]

The Fifth Circuit's concern that Petitioner's claim would require "judicial scrutiny of the merits of the revocation decision" rests on a misperception of *McDonnell Douglas*. A. 3a. Petitioner can carry his burden of proving retaliation and pretext with evidence of the FBI's

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[6] The Ninth Circuit recently issued the first reported decision holding that there was no jurisdiction to review the revocation of a security clearance where the plaintiff alleged race discrimination claims based on Title VII and the Fifth Amendment. *Brazil* v. *U.S. Dep't of Navy*, 66 F.3d 193 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3439 (U.S. Dec. 14, 1995) (No. 95-957). Unlike Petitioner, the *Brazil* plaintiff did not allege retaliation. Nevertheless, *Brazil* demonstrates that another court has recently ousted federal-court jurisdiction in conflict with this Court's decisions.

treatment of Petitioner before he joined *Perez*, the FBI's reaction to his participation in *Perez*, the timing of the FBI's actions, the FBI's conduct against other persons who have committed acts of comparable seriousness, and the FBI's general policy and practice with respect to minorities. *McDonnell Douglas*, 411 U.S. at 804-05. None of this evidence would require the district court to review the merits of a security clearance revocation.

II. THE FIFTH CIRCUIT'S DECISION IS IN CONFLICT WITH THIS COURT'S DECISIONS CONCERNING FEDERAL COURT JURISDICTION OVER CONSTITUTIONAL CLAIMS.

Petitioner alleged that he was fired because he is Hispanic and because he joined a civil rights lawsuit against his employer. This retaliation and discrimination give rise to claims based directly on the First and Fifth Amendments to the Constitution. *See Perry* v. *Sindermann*, 408 U.S. 593, 598 (1972) (violation of First Amendment right to speak about matters of public interest and importance gives rise to "constitutional claim"); *Passman*, 442 U.S. at 244, 236 (1979) (permitting "a cause of action under the Fifth Amendment" to enforce the "constitutional right to be free from illegal discrimination"). Under this Court's decisions, Title VII does not oust the federal courts of jurisdiction over Petitioner's constitutional claims.

A. *Webster* Permits Judicial Review of Constitutional Claims in Matters Involving "National Security."

This Court held in *Webster* that "a constitutional claim based on an individual discharge may be reviewed by the District Court," 486 U.S. at 603-04, notwithstanding the CIA's argument that judicial review was precluded "no matter what the nature of respondent's constitutional claims." *Id.* at 603. The Court warned that a " 'serious constitutional question' . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* (quoting *Bowen* v.

Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986)).

In *Webster*, the CIA terminated an employee after learning that he was a homosexual. The employee challenged his termination by "assert[ing] a variety of statutory and constitutional claims." *Id.* at 596. The CIA moved to dismiss the action, arguing that § 102(c) of the National Security Act [7] precludes judicial review of the CIA Director's termination decisions under the Administrative Procedure Act ("APA").[8]

After reviewing "the language and structure" of § 102 (c), the Court held that the statute precluded judicial review of the employee's *statutory* claim under the APA. 486 U.S. at 601. However, the Court applied a different analysis to the question whether the employee's *constitutional* claims were also precluded, emphasizing "that where Congress intends to preclude judicial review of *constitu-*

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[7] Section 102(c) states, in pertinent part, as follows:

> [T]he Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States . . . .

50 U.S.C. § 403(c).

[8] In its argument in the district court in *Webster*, the government actually took the position that it did *not* have the unbridled authority it now claims in this case:

> THE COURT: [O]ne paramount question . . . is whether or not you claim that the agency has unlimited and unbridled authority.
>
> * * * *
>
> MR. WHITE: The director is not asserting that he has what the Court has characterized as unlimited or unbridled authority. The statutes applicable to the Director's authority certainly do not give him the power to act unconstitutionally and the provisions of Title VII, for example, would apply if there is a fair allegation of improper personnel practices discriminating against employees on the basis of race, for example.

A. 18a-19a.

tional claims its intent to do so must be clear." *Id.* at 603 (emphasis added). Applying that "heightened" standard to § 102(c), the Court concluded:

> Nothing in § 102(c) persuades us that Congress meant to preclude consideration of colorable constitutional claims arising out of the actions of the Director pursuant to that section; we believe that a constitutional claim based on an individual discharge may be reviewed by the District Court.

Id. at 603-04.

The Court was not persuaded by the CIA's claim that judicial review of such constitutional claims would "entail extensive 'rummaging around' in the Agency's affairs to the detriment of national security." *Id.* at 604. "Title VII claims attacking the hiring and promotion policies of the Agency are routinely entertained in federal court . . . and the inquiry and discovery associated with those proceedings would seem to involve some of the same sort of rummaging." *Id.* Moreover, the Court noted, concerns over national security can be satisfied by the district court, which "has the latitude to control any discovery . . . so as to balance . . . [the] need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." *Id.*

B. Title VII Does Not Oust Federal Courts of Jurisdiction Over Constitutional Claims in Cases Where Title VII Fails to Provide a Remedy.

Nothing in Title VII satisfies the "heightened showing" required by *Webster* to oust the district court of jurisdiction over Petitioner's constitutional claims. *Id.* at 603. Relying on *Brown*, the Court of Appeals held that the district court "lacked jurisdiction over [Petitioner's] *Bivens* claims under the First and Fifth Amendments . . . [because] Title VII provides both the exclusive cause of

action and the exclusive remedy for federal employees who wish to assert claims of employment discrimination." A. 4a.

This decision conflicts with *Passman*, which holds that Title VII does not pre-empt a *Bivens* action when the plaintiff is "unprotected by the statute." 442 U.S. at 247. When Title VII offers no protection and "no other alternate forms of judicial relief" are available, Title VII "leaves undisturbed whatever remedies petitioner might otherwise possess." *Id.* at 245, 247. Thus, in a case decided the same day as *Brown*, this Court accorded a non-Title VII judicial remedy for a claim of federal employment discrimination to an alien who was not protected by Title VII. *See Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 96 (1976). And more recently, *Webster* permitted a homosexual who was not covered by Title VII to bring a *Bivens* action. 486 U.S. at 592-93.

In *Bush* v. *Lucas*, 462 U.S. 367, 385, 386 (1983), this Court held that a federal employee could not assert a *Bivens* claim based on the First Amendment, but only because he was actually "protected by an elaborate, comprehensive scheme" that provided "the right to examine all disclosable materials that formed the basis of the proposed action," *id.* at 386, "a trial-type hearing at which the employee could present witnesses, cross-examine the agency's witnesses, and secure the attendance of agency officials," *id.* at 387, and judicial review in either federal district court or the Court of Claims of any adverse decision. *Id.* By contrast, Petitioner got nothing that can be described as "meaningful." *Id.* at 386. His sole "remedy" was to correspond with and make a written plea to the very branch of government that was found to have discriminated against him in this case.[9]

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[9]As the concurrence in *Bush* emphasized, if the plaintiff had not actually been protected by the "comprehensive scheme," a differ-

The Court of Appeals disposed of Petitioner's constitutional claims using a mechanical—but flawed—syllogism based on *Brown*. *Brown* held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." 425 U.S. at 835. Therefore, the argument goes, because Title VII is a statutory remedy, Petitioner cannot raise constitutional claims that entitle him to judicial review under *Webster*.[10]

The illogic of this syllogism is that Petitioner's so-called exclusive remedy, as interpreted by the Court of Appeals, is no remedy at all—the court, it holds, does not even have jurisdiction over the matter. Thus, the problem with the court's decision is that "[i]t simply makes no sense to speak of an 'exclusive judicial remedy' when there is no remedy at all." *Davis* v. *Passman*, 544 F.2d 865, 874 (5th Cir. 1977), *aff'd*, 442 U.S. 228 (1979). Nevertheless, the court held that this exclusive remedy—though non-existent—displaces Petitioner's rights under the Constitution. In other words, Petitioner is actually worse off as a result of being "protected" by Title VII.[11]

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ent case would have been presented. 462 U.S. at 390 (Marshall, J., concurring).

On August 2, 1995, the President issued Executive Order No. 12,968 to establish a uniform federal program regarding access to classified information. Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (1995). The Order, which comes too late to benefit Petitioner, does not in any event provide a "meaningful" remedy because it "is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review." *Id.*, § 7.2(e) at 40,254. Accordingly, the Order does not oust the district courts of jurisdiction over Title VII or *Bivens* actions. *See Passman*, 442 U.S. at 243-44 n.21.

[10] Of course, because sexual orientation is not a protected class under Title VII, the plaintiff in *Webster* was unable to bring a Title VII claim. His only recourse was a *Bivens* action based directly on the Constitution.

[11] In *Brazil*, the Ninth Circuit attempted to distinguish *Passman*, stating that Mr. Brazil was "covered by the 'massive and complex

As the decisions of this Court in *Passman*, *Hampton*, and *Webster* establish, the mere enactment of Title VII did not suddenly take away federal court jurisdiction to protect constitutional rights in cases where Title VII provides no protection at all. The Fifth Circuit's decision cannot be reconciled with these cases, or with the words of Judge Goldberg, whose panel opinion was affirmed by this Court in *Passman*:

> Title VII among other things implements constitutional rights . . . . When the statute affords relief from a constitutional invasion, the statutory methodology should be followed, but when the statute does not attempt to implement the constitutional rights sought to be vindicated, we cannot then use the statute as the sword to demean or to eliminate the constitutional right. The constitutional right stands on its own words without the necessity of Title VII's supporting procedures. Title VII's exemptions cannot build a haven for constitutional transgressors.

544 F.2d at 876.

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program' of Title VII in all areas of discrimination except for that relatively narrow area dealing with security clearance decisions." 66 F.3d at 198. However, that distinction is artificial because the "relatively narrow area" referred to by the court is the exception that swallows the rule—in *every* Title VII case, the agency can use this "narrow area" as a pretext to wipe out jurisdiction. More importantly, the attempted distinction violates the most fundamental rules of statutory construction. Congress wrote that Title VII applies to "[a]ll personnel actions." 42 U.S.C. § 2000e-16(a). Congress did not say, "all personnel actions, except for retaliation claims and security clearance decisions." This Court does not permit the judiciary to create exceptions to the plain language of statutes where Congress has not done so. *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 26 (1993).

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

DANIEL F. KATZ
STEPHEN D. RABER *
WILLIAMS & CONNOLLY
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000
Attorneys for Petitioner

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* Counsel of Record